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Noteworthy

"Senators should conduct the nomination process with civility and fairness, including a fair hearing, floor debate and timely up-or-down vote on confirmation. It is important that we have a fair, up-or-down vote and ensure that the new justice is confirmed and sitting on the bench for the start of the Supreme Court term in October to prevent disruption to the administration of justice."

-Senator Santorum, 7/19/05, *The Hill*

Judges are not politicians

By John Cornyn

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Recent news reports paint a troubling picture of the planned obstruction that will confront anyone the president nominates to the Supreme Court. The framework for this attack is already being carefully constructed, and some Senate Democrats have stated their intentions to demand nominees answer questions on controversial political issues, including whether the nominee supports laws related to the environment, civil rights and abortion; the appropriate role of religion in government; and how to balance environmental and energy interests.

However, ample precedent exists in previous confirmations, and long-standing tradition and norms of the Senate confirmation process that indicate nominees should not indulge these questions.

This plan to demand that the president's nominees state their view on each provision in the Democratic Party platform indicates a change of heart in some on the other side of the aisle. And it suggests that perhaps some have forgotten the proper role of our nation's independent judiciary.

Put simply, judges are not politicians. Judges do not vote on cases like politicians vote on legislation. Judges do not vote for or against environmental laws, for example, because constituents demand it or because their consciences so dictate. Judges are supposed to rule on cases in accordance with the law — as written by the people's representatives. If a judge disagrees with written law, he or she must not substitute personal views. Any other approach is simply inconsistent with democratic theory, with government by the people and with respect for the rule of law.

This means that, so long as the Senate is satisfied that the nominee will do what the president has said he wants his nominee to do — that is, to implement the law as it was written — there is no reason to demand answers from a nominee on individual cases or issues. Indeed, the only reason to ask such questions would be to politicize the process.

The better way to proceed exists in the manner the Senate considered the 1993 nomination of Justice Ruth Bader Ginsburg. Prior to her service on the federal bench, Justice Ginsburg served as the general counsel for the American Civil Liberties Union, an organization that has championed the abolition of traditional marriage laws and challenged the validity of the Pledge of Allegiance for invoking the phrase "One nation under God."

Before becoming a judge, Justice Ginsburg declared opposition to traditional marriage laws and to laws against prostitution. She had also written that the Boy Scouts and Girl Scouts are discriminatory institutions, and that taxpayer funds should be used to pay for abortions — hardly views the American people would consider mainstream.

Yet, Senate Republicans and Democrats alike did not try to exploit her personal views. Rather, they overwhelmingly approved her nomination after a thorough review in committee and substantive debate in the full Senate.

Of course, senators have the power to ask whatever questions they want of nominees. But just because some senators may ask nominees to prejudge particular cases and issues does not mean that the president's nominees should indulge them.

Nominees should not answer these questions for two reasons. First, a nominee cannot remain independent if the confirmation is conditioned on political commitments. The Founding Fathers wanted our judges to be independent from the political branches. It threatens the independence of the judiciary to parade nominees in front of the Senate and ask them to state their views on whether, for example, constitutional power exists to enact certain environmental and civil rights laws. How can a nominee remain independent if his confirmation is conditioned on whether or not he pledges to uphold legislation enacted by Congress?

Second, judges in our system are supposed to be impartial, and so asking for commitments undermines a nominee's ability to remain impartial once confirmed. If nominees are forced to pledge to uphold certain laws enacted by Congress in order to win confirmation, how can a litigant, challenging one of those laws in court, expect a fair and open-minded hearing when bringing a case before a judge who has made political commitments to politicians?

It is for this reason the American Bar Association's canon of judicial ethics specifically prohibits a nominee from making "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." It is also for this reason that — as Justice Ginsburg recently noted in a written judicial opinion — every member of the current Supreme Court declined to answer questions during their respective confirmation hearings as to their personal views on particular questions and issues.

Conditioning the confirmation of the president's nominees on adherence to a particular political platform does not respect the independence of the judiciary, nor the need for judges to remain impartial. Judges are not politicians. The Senate should not treat them as if they are.

Sen. John Cornyn, Texas Republican, is chairman of the Judiciary Committee's Subcommittee on Immigration, Border Security and Citizenship.